

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DAVID A. SCHLEMM,

Petitioner,

v.

Case No. 05-C-0561

PHILIP KINGSTON, Warden,

Respondent.

ORDER DENYING PETITIONER'S REQUEST FOR STAY OF TRANSFER

On April 30, 2007, the petitioner, David A. Schlemm ("Schlemm"), filed a letter requesting this court to stay his transfer from the Waupun Correctional Institution to the Green Bay Correctional Institution. In support of his motion, Schlemm relies upon Federal Rule of Appellate Procedure 23. Rule 23, entitled "Custody or Release of a Prisoner in a Habeas Corpus Proceeding," provides in pertinent part that,

[p]ending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.

Fed. R. App. P. 23. Rule 23 of the Federal Rules of *Appellate* Procedure, however, is not applicable to this action because Schlemm's petition for a writ of habeas corpus is pending before this court, a *district* court, not an *appellate* court. Consequently, Schlemm's request that the court stay his transfer to the Green Bay Correctional Institution will be denied. The court notes that if the petitioner is in fact transferred to the Green Bay Correctional Institution, counsel for the respondent

should move the court to substitute the proper respondent, that is, the warden of Green Bay Correctional Institution, for the current respondent, the warden of Waupun Correctional Institution.¹

NOW THEREFORE IT IS ORDERED that the petitioner's request to have his transfer stayed be and hereby is **DENIED**.

SO ORDERED this 30th day of April 2007, at Milwaukee, Wisconsin.

/s/ William E. Callahan, Jr.
WILLIAM E. CALLAHAN, JR.
United States Magistrate Judge

¹ The court further notes that both Waupun Correctional Institution and Green Bay Correctional Institution are located in the Eastern District of Wisconsin.